Supreme Court, U.S.
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No. 92-1236

In The

Supreme Court of the United States

October Term, 1992

UNIT RIG, INC., TEREX CORPORATION and MRL ACQUISITION CORPORATION,

Petitioners,

v.

JOHN W. WHALEN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit erred in finding that the plaintiff's charge of unlawful employment discrimination, consisting of the Age Intake Questionnaire, Age Complaint Affidavit and counsel's letter to the OHRC dated October 31, 1988, constituted a proper charge under 29 U.S.C. § 626(d).

2. Whether the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit erred in holding that the evidence presented at trial was sufficient to support the jury's verdict. Specifically, whether Whalen met his burden of establishing as an element of his prima facie case of discrimination under the Age Discrimination in Employment Act that he applied for employment or otherwise made his interest in employment known to the defendants.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent, John W. Whalen ("Whalen"), respectfully requests that this Honorable Court deny the Petitioners' request for a writ of certiorari. The Respondent submits that the result in this case is consistent with previous decisions of this Court, of the United States Court of Appeals for the Tenth Circuit and of other circuit courts of appeal.

The questions presented by the Petitioners concern issues of fact and the lower courts' interpretation of administrative procedures under the Age Discrimination in Employment Act ("ADEA"). These issues were decided by the trial court and affirmed by the Tenth Circuit solely on the basis of the unique facts and circumstances present in this case. Accordingly, the decision is of no real significance in the administration of future ADEA claims and has little or no precedential value. For these reasons, the Respondent respectfully asks that the Petitioners' request for a writ of certiorari be denied.

OPINIONS BELOW

See Petitioners' Appendix A-1 to A-23 and Respondent's Appendix A-1 to A-6.

JURISDICTIONAL STATEMENT

The Respondent accepts the Petitioners' jurisdictional statement.

STATUTORY AND REGULATORY PROVISIONS

The Petitioners' statement of the statutes and regulations governing determination of the issues raised in their request for certiorari incorrectly includes a citation to 42 U.S.C.A. § 2000e-5. Section 2000e-5 contains enforcement provisions applicable to charges filed under Title VII of the Civil Rights Act of 1964. While it is true that courts have applied case law developed under Title VII to analogous situations arising in employment discrimination suits brought under the ADEA,[1] where clearly different procedures exist, there is no justification for reliance on Title VII authority. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Due to the significant differences in the remedial and procedural provisions of the two statutes, the Court in *Lorillard* refused to apply Title VII authority to procedural issues arising under the ADEA.

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[1] Cases cited by the Petitioners (Petitioners' brief, p. 12, n. 1) approved of the application of Title VII authority *only* where its provisions have similar or identical counterparts within the ADEA. *See, e.g., Aronsen v. Crown Zellerbach*, 662 F.2d 584, 588-89 (9th Cir. 1981) (filing deadlines in deferral states are virtually identical under ADEA and Title VII regulations and, therefore, Title VII authorities may be used as "interpretive aids" in ADEA cases); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-15 (1st Cir. 1979) (methods and burden of proof suggested for Title VII cases in *McDonnell Douglas* may be applied in ADEA cases given the important similarities in the aims and substantive provisions between the two statutes). Even if resort to Title VII case law were appropriate for the interpretation of ADEA administrative procedures, there is *no* authority to support direct application of the Title VII statutes to cases brought under the ADEA.

As discussed in this response, and as noted by this Court in *Lorillard*, the ADEA's administrative enforcement and charge filing procedures are significantly different from their Title VII counterparts. *See also E.E.O.C. v. Wackenhut Corp.*, 939 F.2d 241, 243-44 (5th Cir. 1991) (refusing to apply Title VII authority to proceedings under the ADEA because the two laws "diverge substantially in their enforcement provisions.") Accordingly, the statutes, regulations and case law controlling the administration and enforcement of Title VII has no place in the analysis of the issues raised in the Petitioners' Brief.

STATEMENT OF THE CASE

An accurate statement of the case, based upon the evidence presented at trial, is contained in the opinion of the Tenth Circuit. Petitioners' Appendix at A-2 to A-3. In its present posture, this case involves a *factual* dispute concerning (1) the sufficiency of the evidence supporting Whalen's prima facie case of discrimination and (2) the sufficiency of the charge Whalen filled with the EEOC alleging unlawful employment discrimination on the basis of age.

The Petitioners' Statement of the Case mischaracterizes the nature and the scope of the appellate decision in this case. The Tenth Circuit did *not* hold, as suggested by the Petitioners, that a valid charge of discrimination under the ADEA need not name the respondent, describe the nature of the discriminatory act or be reasonably related to the causes of action ultimately raised in a federal court complaint. To the contrary, the Tenth Circuit properly held these requirements to be valid, but

affirmed under the specific facts of the case, the trial court's determination that Whalen had satisfied each of the ADEA's procedural prerequisites to the filing of a lawsuit.

The Petitioners further suggest that the Tenth Circuit's decision permits a plaintiff to maintain an action for "failure to hire" under the ADEA even if the plaintiff had neither applied for employment nor made his interest in employment known to the prospective employer. This simply is not true. The court of appeals *and* the district court recognized this as an essential element of Whalen's prima facie case. The Tenth Circuit merely held that sufficient evidence was presented to support the jury's determination that Whalen had made his interest in the job specifically known to the defendants.

The Respondent must also direct the Court's attention to three material misstatements contained in Petitioner's summary of facts. First, the Petitioner incorrectly states that this case arose from Whalen's termination from employment by Unit Rig and Equipment Company ("URE") prior to the Petitioners' acquisition of URE's assets. As the court of appeals correctly noted and as discussed at length by the district court, this case "was not a simple discharge-because-of-age case; it was more complex because of the [Petitioners'] concerted arrangement to fire all the URE employees and hire back only those of their choosing." *Order Denying Defendants' Motion for Summary Judgment,* Petitioners' Appendix at A-18.

Petitioners' second misstatement arises from their assertion that Whalen never "inform[ed] anyone with Unit Rig or Terex that he had an interest in the controller

position or other permanent employment with Unit Rig."[2] The court of appeals held that ample evidence was submitted to enable the jury to conclude, as they evidently did, that "even without a formal job application, Terex officials were on specific notice that Mr. Whalen was interested in the job of Controller." *Opinion of the United States Court of Appeals for the Tenth Circuit,* Petitioners' Appendix at A-6.

Finally, the Petitioners' reference to the filing of Whalen's action in the district court "prior to the completion of the administrative procedures"[3] while technically accurate, is misleading in that it implies that either exhaustion of administrative remedies or receipt of a notice of right to sue is required under the ADEA. The only significance of the December 30, 1988 filing date is that it demonstrates that Whalen complied with the 60-day deferral period required under 29 U.S.C. Section 626(d).

SUMMARY OF REASONS FOR DENYING PETITIONERS' REQUEST

The Petitioners' request for a writ of certiorari should be denied because the Tenth Circuit, in affirming the judgment of the district court, correctly and consistently applied the law and regulations governing administrative filing requirements under the ADEA to the findings of fact made in the district court. Both the district court and the court of appeals concluded that: (1) Whalen filed a

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[2] *See* Petitioners' Brief, p. 8.

[3] *Id.*

proper and timely charge of unlawful discrimination against each of the Petitioners; (2) the cause of action alleged in Whalen's complaint was like or reasonably related to the factual allegations contained in his EEOC charge; (3) Whalen made his interest in the position of Controller specifically known to the Petitioners; and (4) the EEOC had sufficient information before it as a result of Whalen's charge that it could have notified each of the Petitioners and undertaken efforts toward conciliation.

Despite the Petitioners protests to the contrary and their attempt to graft the administrative procedures of Title VII to this case, all that is required of a plaintiff under the ADEA is that he file a charge in writing identifying the prospective respondents and generally describing the acts alleged to be discriminatory. 29 C.F.R. § 1626.8(b). *See Foster v. National Bank*, 857 F.2d 1058, 1060 (5th Cir. 1988). The plaintiff must then wait 60 days to file a complaint in district court. Whalen clearly met this burden.

The grant of a writ of certiorari in this case will neither quell a flood of litigation nor resolve an existing conflict among the circuits. Due to the unique facts present in this case, its outcome will have little or no effect upon employment discrimination law. In short, this case is of great importance only to the parties themselves. The Respondent respectfully suggests that the best way for this Court to protect the time and resources of an "overwhelmed and understaffed judiciary"[4] is to deny Petitioners' request for writ of certiorari.

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[4] Petitioners' Brief, p. 11.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The United States Court of Appeals for the Tenth Circuit properly affirmed the trial court's analysis of the administrative filing requirements under the ADEA and its conclusion that Whalen's charge of discrimination satisfied all procedural prerequisites to suit.

Under the ADEA, unlike Title VII, a plaintiff need only file a timely charge with the EEOC alleging unlawful discrimination and wait a period of 60 days to commence his civil action. 29 U.S.C. § 626(d). In order to constitute a valid charge, it is only necessary that the charge be in writing, name the prospective respondent(s) and generally allege the discriminatory acts. 29 C.F.R. § 1626.6. *Compare* 42 U.S.C. § 2000e-5(b) to (e) (requiring, *inter alia*, that a valid charge under Title VII be under oath and contain such information and be in such a form as the Commission requires).

The district court's analysis of the administrative procedures under the ADEA correctly noted that there are no formal charge filing requirements, but that the requirement of a "charge" is satisfied by the filing of a written statement identifying the potential defendant and generally describing the allegedly discriminatory action. *Order Denying Defendants' Motion for Summary Judgment*, Petitioners' Appendix at A-17. The Tenth Circuit specifically adopted the district court's analysis and conclusion on this issue. *Order on Petition for Rehearing*, Petitioners' Appendix at A-13.

A. Whalen's charge of discrimination identified each of the defendants and generally described the actions which he alleged constituted unlawful discrimination on the basis of age.

The Petitioners argue that Whalen's charge was insufficient on two grounds. First, the Petitioners claim that Whalen did not name them as respondents in his filings with the OHRC. The Petitioners next argue that the charge did not allege "failure to hire" as set forth in his complaint. Both the court of appeals and the district court, according to the Petitioners, disregarded the alleged insufficiency of Whalen's charge resulting in a conflict among the circuits over the issue of whether a valid charge of discrimination is a prerequisite to litigation in federal court.

As reflected in the record, both lower courts *did* consider the Petitioner's arguments concerning the sufficiency of Whalen's charge and rejected each and every one. The trial court made the following findings with regard to the sufficiency of Whalen's charge of discrimination filed with the OHRC:

> The Court concludes, under the unusual circumstances of the acquisition of Plaintiff's former employer, URE, that the filings made by Plaintiff with the OHRC were sufficient to constitute a "charge" within the meaning of 29 U.S.C. Section 626(d). The Court further concludes that the agency had sufficient information, had it so chosen, to notify the Defendants of Plaintiff's complaint. Plaintiff's Age Complaint Affidavit, plus his attorney's letter of October 31, 1988, made it more than clear that he intended to pursue his claims against these entities notwithstanding

> that OHRC was only pursuing the claim against URE.

Order Denying Defendants' Motion for Summary Judgment, Petitioners' Appendix at A-19 (footnote omitted). The Tenth Circuit adopted the analysis and conclusions reached by the trial court. *Order on Petition for Rehearing,* Petitioners' Appendix at A-13.

Unlike Title VII, which requires that a "charge" be made under oath and in the form specified by the EEOC,[5] the ADEA requires only that the charge be in writing, name the prospective respondents and generally describe the discriminatory conduct.[6] The Petitioners ask this Court to hold that a "charge" under the ADEA cannot be made without the filing of an Age Official Complaint Form. There is *no* authority for this position in a case brought under the ADEA. The information Whalen provided to the EEOC in the Age Complaint Intake Questionnaires, the Age Complaint Affidavit and in counsel's letter of October 31, 1988, was more than sufficient to indicate his intention to activate the EEOC's enforcement machinery. These writings, filed within the time permitted under 29 U.S.C. § 626(d), clearly identified the Petitioners as respondents and generally described the actions which Whalen alleged to be discriminatory. Nothing more is required. *Clark v. Coats & Clark, Inc.* 865 F.2d 1237, 1240-41 (11th Cir. 1989); *Steffen v. Meridian Life Insurance Co.* 859 F.2d 534, 542-44 (7th Cir. 1988).

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[5] 42 U.S.C. § 2000(e)-5(b).

[6] 29 C.F.R. § 1626.6 This section, in stark contrast to the rigid requirements of Title VII, also permits the receipt of verbal charges in person or by telephone if the charge is ultimately reduced to writing.

The Petitioners also challenge the sufficiency of Whalen's charge since it did not contain the phrase "failure to hire". However, as the Petitioners admit,[7] a plaintiff may properly bring an action to recover on all claims which are included in the administrative charge *and* claims which are like or reasonably related to allegations contained in the charge. Whether a cause of action contained in the complaint is "like or reasonably related to" allegations contained in the charge depends upon the scope of the investigation which that charge may reasonably trigger on the part of the EEOC. "An administrative charge is not a blueprint for the litigation to follow . . . Rather, the critical question is whether the claims set forth in the civil complaint come within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination'." *Powers v. Grinnell Corp.* 915 F.2d 34, 38 (1st Cir. 1990) (citations omitted). *See also Tamimi v. Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1987); *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678 (5th Cir. 1975); *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971).

The notice requirement under the ADEA is a practical one. "It does not call for ritualistic incantation, and should not be subjected to the searching scrutiny once accorded common law pleadings." *Bihler v. Singer Co.*, 710 F.2d 96, 101 (3d Cir. 1983) (dissenting opinion, citing *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 283 (8th Cir. 1983)).

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[7] *See* Petitioners' Brief, p. 14.

In this case, the trial court and the appellate court agreed that Whalen's charge was sufficient under the specific facts of the case.

> Plaintiff's grievance was not a simple discharge-because-of-age case; it was more complex because of the Defendants' concerted arrangement to fire all the URE employees and hire back only those of their choosing. . . . The court concludes the OHRC could have perceived the inherent complexity of plaintiff's complaint by statements in the age complaint affidavit that "these entities acted in concert to unlawfully terminate my employment on the basis of age."

Order Denying Defendants' Motion for Summary Judgment, Petitioners' Appendix at A-18 & n.17.

The district court found that Whalen satisfied the administrative charge requirement under Section 626(d). Whalen's charge identified each of the Petitioners as prospective respondents, generally described the acts which Whalen alleged to be discriminatory, and was like or reasonably related to the allegations ultimately contained in the complaint filed in federal district court.

Neither the Tenth Circuit nor the trial court held that Whalen was excused from filing a charge with the EEOC before bringing an action in federal court. Nor did the lower courts hold that the Petitioners need not be named in the charge or that the allegations in the complaint need not be related to those raised in the charge. The Petitioners suggest that this case represents a conflict among the circuits with respect to the charge filing requirements under the ADEA. The Petitioners' argument is valid only if this Court accepts the Petitioners' version of the facts

and rejects the factual determinations made in the district court and adopted by the Tenth Circuit.

This Court has consistently ruled, absent an exceptional showing, that it will not undertake a review of factual determinations in which the lower courts have concurred. *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980). Because the Petitioners' request for a writ of certiorari depends upon just such a review, it should be denied.

B. Under the ADEA, a plaintiff need only file a charge of discrimination and wait for the expiration of the 60-day deferral period before commencing suit in federal court.

The Petitioners imply that Whalen had an obligation to proceed through administrative channels in an attempt to settle his dispute with the Petitioners prior to bringing an action in federal court. Some courts have held that the EEOC has an obligation to first provide notice and attempt to conciliate before resorting to litigation. *See Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1338-39 (10th Cir. 1979). However, even under Title VII, with its stringent administrative regulations, it is not required that a *private* plaintiff do more than comply with the charge filing requirement. In *Beverly v. Lone Star Lead Construction Corp.*, 437 F.2d 1136 (5th Cir. 1971), cited by the Petitioners in support of their conciliation argument, the court recognized that since a private plaintiff is unable to influence EEOC action it cannot be penalized for the EEOC's failure to conciliate. *Id.* at 1139.

The charge filing requirements and the 60-day deferral period under Section 626(d) are intended to provide

the EEOC with sufficient *opportunity* to eliminate unlawful practices through informal conciliation. The district court and the court of appeals determined that Whalen had met his obligations in this regard and that the charge filed with the EEOC contained sufficient information to permit the agency, had it so chosen, to notify the Petitioners of Whalen's allegations and to initiate conciliation. *Order Denying Defendants' Motion for Summary Judgment,* Petitioners' Appendix at A-19.

Whalen made every reasonable attempt to activate the EEOC's notice and conciliation procedure. The failure of the EEOC to take advantage of this opportunity for conciliation or even to notify each of the respondents named in Whalen's charge has absolutely no effect upon *his* ability to maintain an action after expiration of the deferral period. *Albano v. Schering-Plough Corp.,* 912 F.2d 384, 388 (9th Cir. 1990); *Stearns v. Consolidated Management, Inc.,* 747 F.2d 1105 (7th Cir. 1984); *Smith v. Sentry Insurance,* 674 F. Supp. 1459 (N.D. Ga. 1987).

II. The United States Court of Appeals for the Tenth Circuit correctly held that sufficient evidence was presented to the jury to support its finding that Whalen had made his interest in the position of Controller known to the Petitioners.

The Petitioners state that the decision of the Tenth Circuit is in conflict with the decisions of other circuits in that the Tenth Circuit did not require that Whalen prove, as a part of his prima facie case, that he either applied for

or otherwise made his desire for the position of Controller known to the Petitioners.[8] This is patently untrue.

This issue was submitted to the jury at trial and addressed by both the district court and the court of appeals in the following manner:

> Employment discrimination law does not require that a plaintiff formally apply for the job in question. Rather, the law requires either that the employer be on specific notice that the plaintiff seeks employment or, where informal hiring procedures are used, that the plaintiff be in the group of people who might reasonably be interested in the particular job . . . Mr. Hill testified that no formal employment application procedures were followed. In addition, Mr. Whalen testified that he informed Mr. Skaff when he left his job as Controller that he needed work. ***A jury could reasonably infer from this evidence that even without a formal job application, Terex officials were on specific notice that Mr. Whalen was interested in the job of Controller.***

Opinion of the United States Court of Appeals for the Tenth Circuit, (emphasis added), Petitioners' Appendix at A-5 to A-6.

> This Court, in its earlier Order filed April 17, 1990, at fn. 10, commented that "Defendants' tongue-in-cheek proposition that Plaintiff never applied for a job with the new company is disingenuous in light of the deposition testimony of the new entity's new president, Frank Hill . . . ". The crux of Hill's testimony was that there was

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[8] *See* Petitioners' Brief, p. 19.

> no need for anybody to apply with URI since the URE employees were told if they did not receive severance pay on July 14, 1988, they were to report to work for URI on July 15, 1988. Defendants have failed to provide any trial evidence which refutes this. In fact, Whalen's own trial testimony fully supports that no one "in fact applied for the job for which they were hired at Unit Rig, Inc." Defendants' argument on this issue is no less disingenuous as part of their motion for judgment *non obstante veredicto.*

Order Denying Defendants' Motion to Reconsider, (citation omitted), Respondent's Appendix at A-2 to A-3.

The district court properly instructed the jury that Whalen was obligated to establish, as an essential element of his claim, that "he applied for or made known to the defendants his interest in the job, but was denied the job." *Trial Transcript, pp. 639-40,* Respondent's Appendix at A-10. Whether Whalen satisfied this element of his prima facie case was a factual issue decided by the jury on the basis of the evidence presented at trial. The decisions of the district court and the Tenth Circuit merely hold that the evidence was sufficient to support the jury's verdict and, presumably, the jury's determination that Whalen had made his desire for employment sufficiently known to the Petitioners. The Petitioners' argument is no less "disingenuous" here than it was when first presented to the district court.

CONCLUSION

The Petitioners have failed to show the existence of a conflict among the circuits resulting from the decision of the Tenth Circuit in this case. Furthermore, there has been no "extraordinary showing" upon which to justify the exercise of this Court's discretionary review over factual determinations in which both lower courts concur. For the reasons stated herein, the Respondent requests that the Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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APPENDIX

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Appendix A Order Denying Defendants' Motion to Reconsider, *John W. Whalen v. URE Co., formerly Unit Rig and Equipment Company, Unit Rig, Inc., MRL Acquisition Corp., and Terex Corporation,* Case No. 88-C-1667-B (N.D. Okla., March 29, 1991)..... A-1

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN W. WHALEN Plaintiff, vs. URE CO., a Texas corporation, formerly UNIT RIG AND EQUIPMENT COMPANY, a Texas corporation; UNIT RIG, INC., a Delaware corporation; MRL ACQUISITION CORP., a Delaware corporation; and TEREX CORPORATION, a Delaware corporation, Defendants.	Case No. 88-C-1667-B (Filed March 29, 1991)

ORDER

This matter comes on for consideration upon Defendants' Motion For Judgment Notwithstanding The Verdict Or, In The Alternative, Motion For New Trial.

Motions for Judgment n.o.v. should be granted only where the evidence so conclusively favors one party that reasonable persons would be unable to arrive at a different result. ***Western Plains Service Corp. v. Ponderosa Development Corp.,*** 769 F.2d 654 (10th Cir. 1985). Judgment n.o.v. "should be cautiously and sparingly granted." ***Lucas v. Dover Corp.,*** 857 F.2d 1397 (10th Cir. 1988), quoting ***E.E.O.C. v. Prudential Federal Sav. & Loan Ass'n,*** 763 F.2d 1166 (10th Cir. 1985). In reviewing the

evidence, the Court must draw all reasonable inferences in favor of the party opposing the motion and may only grant the motion when the evidence points but one way and is susceptible of no reasonable inferences which may sustain the opposing party's position. ***E.E.O.C. v. Prudential Federal, supra.***

Defendants present five issues in support of their motion Judgment n.o.v., which will be discussed *seriatim.*

1. Plaintiff failed to make out a *prima facie* case of age discrimination for failure to hire because Plaintiff never applied for a position with Defendants. This is the same premise used by Defendants in moving for summary judgment. This Court, in its earlier Order filed April 17, 1990, at fn.10, commented that "Defendants' tongue-in-cheek proposition that Plaintiff never applied for a job with the new company is disingenuous in light of the deposition testimony of the new entity's new president, Frank Hill . . . ". The crux of Hill's testimony was that there was no need for anybody to apply with URI since the URE employees were told if they did not receive severance pay on July 14, 1988, they were to report to work for URI on July 15, 1988. Defendants have failed to provide any trial evidence which refutes this. In fact, Whalen's own trial testimony fully supports that no one "in fact applied for the job for which they were hired at Unit Rig, Inc".[1] See ***Singer v. Uni-Marts,*** 37 F.E.P. Cases 1197 (D.C.Pa.1985). Defendants' argument on this issue is no less disingenuous as part of their motion for judgment

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[1] Trial transcript of Plaintiff's testimony, page 39, lines 7-16.

non obstante veredicto. The Court concludes this issue provides no basis to grant Defendants the relief sought.

2. Defendants' next issue is that they met their burden of articulating a non-discriminatory reason for their failure to retain Whalen as Controller and therefore shifted the "pretext" burden back to Whalen. The reason articulated was that Defendants wanted their own people in the top financial positions. The jury could have believed Defendants wanted their own "young" people in the top financial positions, particularly Controller.[2] The Court concludes there was ample evidence for the jury to make a determination that the articulated reason was indeed pretextual.

3. Defendants' third issue is that Plaintiff failed to prove that age was a determinative factor in Defendants' decision not to hire him and that Defendants' proffered reason was pretextual. This was in part considered above. Defendants' further articulated reason for not hiring Whalen was that they intended to merge the positions of Controller and Financial Vice-President. The short life of this merger, approximately one week, lends credence to its pre-textual probabilities, presumptively not lost on the jury.

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[2] Evidence presented indicated new President Frank Hill informed Unit Rig's South African division managing director that Whalen was no longer the Controller of Unit Rig and that Hill intended to hire a "young one". Approximately two weeks after the effective date of the acquisition 29 year old William Schein was hired as Controller, being recommended as "a young, inexperienced guy who had never seen the inside of a factory before."

The other aspect of this issue, proof that age was a determinative factor, implicates the Paymaster and RIF lists, the former being organized by age, the eldest at the top. The court's previous Order denying Defendants' summary judgment motion addressed the potential impact of these lists, as follows:

> The Court must consider the significance *vel non* of the RIF list and the Paymaster-Age list, and what significant inferences a fact finder might realize therefrom. Of the top eight names (oldest) on the Paymaster-Age list, six were not rehired (lowered to five when Laven, age 63, was retained under a designation of "retired"). Also, from the top 1/3rd of the Paymaster-Age list, 12 were fired while only 5 were fired from the bottom 1/3rd (youngest) of the list.
>
> The Court concludes the RIF list use and the Paymaster-Age list use, although not essentially disputed, are capable of conflicting inferences by a fact finder *vis-a-vis* indicia of age discrimination.

In its earlier Order the Court referenced a similar but distinguishable case, ***Lucas v. Dover Corp., Norris Div.***, 857 F.2d 1397 (10th Cir. 1988) where this Court was affirmed after entering Judgment n.o.v. in favor of an employer-defendant. In ***Lucas*** the Appellate Court made several observations *apropos* the instant case:

> Finally, the statistics concerning all supervisory employees terminated in the reduction in force do not assist plaintiffs' cause. Those statistics show that of the eighteen employees terminated, eleven were under age forty while seven were over that aged [sic]. While the numbers of employees in the statistical analysis here are

> quite small, and therefore must be evaluated with caution, what evidentiary value they have suggests that older employees were not treated unfavorably.
>
> * * *
>
> In short, while plaintiffs may disagree with Dover's evaluation of who was the best qualified employee to fill the consolidated positions, as long as a jury had no reasonable basis for determining that age was a determining factor in those evaluations, the jury verdict for plaintiffs cannot stand."

In the present case the Court concludes there was sufficient statistical bases, from the two lists and testimony given at trial, for a jury to reasonably conclude that older employees, including the Plaintiff, were treated unfavorably due to their ages. In short, the Court concludes the jury had a reasonable basis for determining that age was a determining factor in Defendants' decision not to hire Whalen.

Defendants' issues 4 and 5[3] are issues of law decided in the Court's earlier Order denying summary judgment. The Court concludes there is no reason to depart from its earlier conclusions on these issues and the same offer no basis for entering Judgment n.o.v.

Defendants' Alternative Motion for New Trial is principally hinged upon the Court's alleged error is allowing

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[3] Issue 4 is: because Defendants were not listed as respondents in the OHRC documents filed by Plaintiff and they never received notice of any charge, J.N.O.V. is appropriate. Issue 5 is: because Plaintiff did not allege "failure to hire" in his OHRC documents, J.N.O.V. is appropriate.

into evidence the two lists discussed above. The Court's discussion of the relevance of these evidentiary items, and the jury's verdict consistent with the inferences permissible therefrom, incline the Court to deny Defendants' Alternative Motion for New Trial.

IT IS SO ORDERED this 29th day of March, 1991.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

* * *

[p. 635] (NOON RECESS)

THE COURT: Be seat, seated, please. Are the parties ready?

MR. MANN: The Plaintiff is ready, Your Honor.

MR. HAGEDORN: Defendant is ready, Your Honor

THE COURT: All right, thank you.

Ladies and gentlemen of the jury, it's now time for the Court to advise you of the law that you're supposed to apply in this case, and I ask you, if you will, to please pay close attention to the instructions I'm going to give you here as you have during the other portion of the trial because you're going to have to consider all of these instructions in [p. 636] your deliberations.

You've heard the evidence and the arguments of the counsel, and the Court now instructs you on the law governing the case.

Understand that although you as the jurors are the sole judges of the facts, you're duty bound to follow the law that I state to you in these instructions and apply this law that I give to you to the facts as you find them from the evidence that has been presented.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict in this case upon any other view of the law than that which I state to you in these instructions.

Now, you shouldn't single out any certain sentence or any individual point or instruction and ignore the others, but you're to consider all of these instructions as a whole and you're to regard each instruction in light of all of the others.

Now, concerning the claims and defenses here. The plaintiff, Mr. Whalen, brings this action for alleged breach of the Age Discrimination in Employment Act. He claims that at age 62 years the defendants refused to hire him as a controller of Unit Rig, Inc. (URI) following the defendants' purchase of that business from plaintiff's former employer, Unit Rig and Equipment Company (URE). Plaintiff claims that [p. 637] he was qualified for the position and that the defendants instead hired a much younger employee to fill it. The plaintiff, Mr. Whalen, claims that the defendants' conduct constitutes a willful violation of the Age Discrimination in Employment Act and that he's entitled to back pay with all employment benefits until December 31st of 1990, that is December 31st of this month.

Now, the defendants, in response, deny the plaintiff's age was a determining factor in not hiring him. The defendants assert that their decision not to hire the plaintiff was based upon legitimate business reasons and not because of Mr. Whalen's age. The defendants state that they desired to install their own top financial management to operate the company that they had just acquired, which had a history of significant financial and operating problems, and this is the reason the plaintiff was not hired. The defendants assert the plaintiff is not entitled to recover herein on his age discrimination claim.

Now, the foregoing recitation as to the claims of the plaintiff herein and the defenses of the defendants is given to you simply to define the issues to be tried between the parties, and such statements do not constitute proof of any fact in evidence in the case.

Concerning the burden of proof. The burden of proof is upon the plaintiff to establish or prove the material alle-[p.638] gations of his complaint by a preponderance of the evidence, and if the plaintiff fails to discharge this responsibility, your verdict should be for the defendants and against the plaintiff.

Concerning burden of proof and preponderance of the evidence. In a civil lawsuit, like this one, there are requirements as to which party is to prove to you certain things. This is called the burden of proof.

When I say that a party has the burden of proof on any proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded, considering all of the evidence in the case, that the proposition on which such party has the burden of proof is more probably true than not true.

Concerning the applicable statutes that are involved here, that is the federal statutes. You are instructed that Title 29, United States Code, Sections 621 to 634 and at Section 623(a)(1), the Age Discrimination in Employment Act provides in pertinent part and I quote:

"It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual because of such individual's age."

Title 21, United States Code, Section 623(f)(1) and (3), the Age Discrimination in Employment Act, provides in [p. 639] pertinent part:

"It shall not be unlawful for an employer to take any action otherwise prohibited under subsection (a) of this section where the differentiation is based on reasonable factors other than age."

You are further instructed that Title 29, United States Code, Section 631, provides:

"Individuals at least 40 but less than 70 years of age.

"The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age."

Now, concerning the elements of the plaintiff's claim. In order to provide the essential elements of the plaintiff's claim, the burden is upon the plaintiff, Mr. Whalen, to establish by a preponderance of the evidence in this case the following facts:

First: That the plaintiff, Mr. Whalen, was at least 40 years of age but less than 70 years of age at the time URI failed to hire him. The age of the plaintiff, 62, at the time of URE's dissolution and URI's creation is not disputed by the defendants;

Second: That the plaintiff was qualified for the controller job that he was denied;

Third: That the plaintiff applied for or made known [p. 640] to the defendants his interest in the job, but was denied the job; and

Fourth: That the plaintiff was rejected in lieu of a younger person.

Each of the above elements must be established by a preponderance of the evidence in the case, and if any is lacking you must return a verdict in favor of the defendants.

Now, once the plaintiff has established the essential elements of his age discrimination, if he does, the burden of proof does not shift to the defendants, but the defendants being only required to come forward with some evidence that supports a legitimate nondiscriminatory reason for the plaintiff's failure to be hired.

If you are satisfied that the plaintiff has established the essential elements of his discrimination claim but the defendants have come forward with evidence that plaintiff was not hired because of reasonable factors other than age, the plaintiff must still bear the burden of establishing a case of discrimination by a preponderance of the evidence.

If you find the defendants have come forward with evidence that the plaintiff was not hired on the basis of some reasonable factor other than age, the plaintiff then has the burden of proving by a preponderance of the evidence that the reasons given by defendants for failure to hire were in fact a pretext to hide or mask age discrimination by the defendants.

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